In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 451

ALEJANDRO D. LLANOS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 1332-1337) is reported in 206 F. 2d 852. The District Court issued no formal opinion. Its findings of fact are contained in pages 34 to 37 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1953 (R. 1338). Time for filing a petition for a writ of certiorari was extended by orders of Mr. Justice Frankfurter and Mr. Justice Douglas to November 3, 1953, and the

petition was filed on November 2, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether notes and other documents evidencing promissory obligations which petitioners issued to members of the public to obtain funds to be used purportedly to finance various alleged promotions and ventures of petitioners were "securities" within the meaning of the Securities Act of 1933.

2. Whether petitioners' solicitation of funds and issuance of promissory documents, as aforementioned, involved "sales" of securities within the meaning of the Securities Act.

3. Whether the trial court erred in admitting into evidence, to show the scope of the fraudulent scheme, promissory notes executed by one of the petitioners but not yet delivered.

STATUTE INVOLVED

The following are the relevant provisions of the Securities Act of 1933, 48 Stat. 74, as amended, 48 Stat. 905, 15 U.S.C. 77, *et seq.*

Section 17(a), 15 U.S.C. 77q(a):

> It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means

of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Section 2(1), 15 U.S.C. 77b(1):

The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscibe to or purchase, any of the foregoing.

Section 2(3), 15 U.S.C. 77b(3):

The term "sale", "sell", "offer to sell", or "offer for sale" shall include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value; * * *.

STATEMENT

Petitioners were convicted of violations of the anti-fraud provisions of Section 17(a) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. 77q(a), of the mail fraud statute, 18 U.S.C. 1341, and of the conspiracy statute, 18 U.S.C. 371, for a multi-million dollar fraudulent scheme which they executed during the years 1946 to 1951. As shown *infra,* the members of the public whom they victimized were largely unsophisticated small wage earners located in the Territory of Hawaii from whom they solicited and obtained these funds upon false representations that the money was needed, and would be used, to finance various promotions and ventures which they engaged in, or which they would engage in. They promised substantial returns on the moneys so obtained, and issued notes and other documents evidencing their promissory obligations to their victims. The obligations contracted admittedly were in excess of $3,000,000; and the total sum involved may have exceeded $6,000,000.

The United States District Court for the District of Hawaii, sitting without a jury, found petitioners guilty on a total of 12 out of 13 counts charging violations of Section 17(a) of the Securities Act, on 5 out of 6 counts charging violations of the mail fraud statute, and on one count charging a conspiracy to commit the foregoing offenses (R. 34-37). Petitioners were afterward sentenced to varying

terms of imprisonment and fines.[1] The various errors which they now assign, relating solely to the convictions on the Securities Act counts, were assigned in and rejected by the court below (R. 1332-1337).

The evidence adduced at the trial established without material contradiction the following: Petitioners first solicited and obtained funds allegedly for wagering on "fixed" volley ball games. Lenders were assured profits in multiples of their advances (R. 167, 175-176, 178-180, 187-189, 211-222, 277-280, 397-404, 558-561). The "fixed" games never took place, and the funds advanced were never returned.

Petitioners' scheme soon expanded from this simple beginning. As members of a fictitious business organization which they called "Llanos and Company", petitioners solicited in the Territory of Hawaii funds for various purported ventures and promotions, and issued or promised to issue notes and other written evidences of indebtedness for moneys received (GX [2] 2, 8, 10, 14, 20-25, 27-30, 34, 37, 38, 44, 45, 61-63). Money was obtained principally from small wage earners, such as plantation workers (R. 212, 381), mill workers (R. 297, 359), mechanics (R. 439, 521), and the like. Among other things, petitioners falsely represented that

[1] Sentences imposed ranged from five years probation to five years and five days imprisonment, and from $1,000 to $10,000 in fines (R. 42-55).

[2] Government exhibits. These exhibits are not contained in the printed Transcript of Record which has been filed by petitioners in this Court.

petitioner Alejandro D. Llanos ("Llanos") was a financier and industrialist who had millions of dollars in the Philippines or on the Mainland (R. 119-120, 127-132, 189-191, 236, 284, 298-299, 381-382, 406-407; GX 19, 40C, 40BB, 43, 57); that Llanos was a creditor of a large shipbuilding company in California (Pollock-Stockton Shipbuilding Company) in the amount of $6,000,000; and that funds were needed to defray travel expenses in connection with efforts to collect this "debt" from the shipbuilding company (R. 81-88, 297-298, 406-407, 520-526, 569-575). At a later stage in the scheme, it was represented by petitioners and their associates that "Llanos and Company" had a fund of $6,500,000 on deposit with a Hawaii bank, which fund would be distributed to the persons from whom money had been obtained (R. 135-140, 195-198, 281, 293-294, 412-413, 500, 561-562). These persons were requested to sign documents which, it was represented, were certificates of membership in "Llanos and Company", and which would entitle them to participate in the distribution of the money in the trust fund. However, no such fund ever existed (GX 9, 16, 59A-C; R. 195-197, 280-282, 291-294, 386-390, 412-413, 1113-1115).

Petitioners also falsely represented that funds obtained would be used to establish new business enterprises, including a proposed Bank of Manila, and, in that connection, that additional money was needed to meet necessary expenses for travel to the Philippines (R. 495, 531-532, 537-538, 540-542). Late in the year 1948 petitioners broadcast and

otherwise publicized a contemplated visit by Llanos to Manila to be made at the invitation of the President of the Philippines who allegedly was seeking Llanos' assistance in establishing industries there. It was represented that persons who advanced moneys to "Llanos and Company" would be paid off by a bank in the Philippines (GX 1; R. 342-344; GX 19; R. 345-348). The promoters of the Bank of Manila fell out with Llanos when he refused to make good his promises to finance the bank (R. 1189-1190; GX 40Q).

Investigations of "Llanos and Company" were commenced by the Territorial Treasurer of Hawaii (also ex-officio Securities Commissioner, R. 883) and the Honolulu Better Business Bureau. Thereafter in August, 1950, petitioners, taking the initiative, requested the Territorial Treasurer to assume supervision of the distribution of the sum of $6,000,000 to members of the public who had advanced funds to "Llanos and Company" (R. 883-888). They then represented that the $6,000,000 were in the Philippines, and would arrive in Hawaii in several weeks. No evidence was ever adduced to show the existence of such a fund (R. 891-892). Subsequently, in response to requests of the Territorial Treasurer, they submitted lists showing obligations of "Llanos and Company" to over 450 persons in the amount of $3,318,802 (GX 52-53). Evidence adduced at the trial established that portions of the information submitted in these lists were false (R. 550-553, 911-913).

Members of the public from whom petitioners ob-

tained funds, as aforementioned, were given promissory notes payable in sixty days, ninety days, or "upon mutual agreement" (R. 237, 383, 419-420, 524, 543-544). Originals or duplicates of promissory notes signed by Llanos but not yet delivered were also admitted into evidence. There were $4,807,549 of "mutual agreement" notes payable to 814 persons (GX 61), $1,251,015 of ninety-day notes payable to 248 persons (GX 62), and $377,500 of sixty-day notes payable to 50 persons (GX 63). The obligations evidenced by these notes total $6,436,064, and comprehend most of the obligations shown on the various lists submitted to the Territorial Treasurer, as well as those of seven of the sixteen witnesses who testified at the trial (R. 1126).

At least seven of the sixteen investor witnesses who testified stated that one or more of the misrepresentations referred to were made to them in order to induce the advances (R. 235-241, 381-382, 384-385, 418-423, 492-498, 520-523, 540-547, 569-571).[3]

While the scheme to defraud was accomplished largely within the Territory of Hawaii, its ramifications, as noted above, extended to the Philippines and the mainland of the United States, and necessitated not only petitioners' use of the mails but also their extensive use of facilities of interstate and foreign commerce in furtherance of the scheme.[4]

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[3] Cf. petitioners' allegation (Pet. 6) that there is not "a scintilla of evidence that any of the representations were employed in furtherance of said scheme".

[4] Seven of the Securities Act counts were based on mailings of letters and promissory notes to victims, letters between

ARGUMENT

Petitioners' contentions relate solely to the Securities Act counts, the applicable provisions of which are clear and unambiguous.[5] The decision below is correct, and presents no conflict or inconsistency with that of any other court.

1. The notes and other documents evidencing petitioners' promissory obligations were clearly "securities" within the meaning of the Securities Act. The typical document, of which the court below took cognizance, read as follows (R. 1335):

> Agreement
>
> This Will Certify That, I the undersigned Alejandro D. Llanos, of legal age, married, residing at 1839 Makiki Street, Honolulu, T. H., borrowed from ..... of ..... THE SUM OF.....DOLLARS ($.....) Which I promise to pay on or before (60 or 90) days from today.
>
> In Witness Hereof, I set my hand to sign this.....day of ....., ...
>
> .....
>
> Alejandro D. Llanos—borrower
>
> Witness:
>
> .....

various petitioners in furtherance of the fraudulent scheme, and a letter enclosing money to petitioners in response to their solicitation. The five remaining Securities Act counts were based on uses of facilities of transportation, and radio broadcasts, in interstate and foreign commerce.

[5] On the conspiracy and mail fraud counts, which petitioners do not challenge, the sentences for the most part run concurrently with each other and with a sentence on a Securities Act count.

Section 2(1) of the Act expressly defines a "security" to include any "note", "evidence of indebtedness", or "investment contract". The court below properly rejected petitioners' curious contentions that this clearly applicable statutory language should be disregarded; that the Court's consideration should be confined to the later disjunctive clause in the statutory definition—"or, in general, any interest or instrument commonly known as a 'security' "; and that the latter clause should be construed to exclude the documents which petitioners issued and which they sought to characterize as mere receipts for disconnected personal loans having no relationship to any purported venture or business promotion.

As this Court observed in *S.E.C.* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, at 350-351, however, the purpose of the clause—"in general, any interest or instrument commonly known as a 'security' "—was to broaden the coverage of the statute beyond the common types of securities, such as notes, which are included in the earlier portion of the statutory definition. The Act was thus rendered applicable to a wide variety of security arrangements which might not be comprehended by the more standardized terms referred to in the earlier portion of Section 2(1). The coverage of the statute as respects the more usual documents and security arrangements, of course, was not intended to be infringed. The documents issued by these petitioners were clearly within the earlier categories—"notes" or "evidences of indebtedness"—and, as

such, were plainly "securities" within the meaning of the statute.[6]

While some types of securities and securities transactions are expressly exempted from the registration requirements of the Act (see Sections 3, 4, 15 U.S.C. 77c, 77d), there are no exemptions from the anti-fraud provisions of Section 17(a) here in question. See Section 17(c), 15 U.S.C. 77q(c). To curb fraudulent transactions, Congress made it clear that the broad statutory concept of a "security" is to be given full scope in applying Section 17(a) of the Act.

The decision below breaks no new ground. In *United States* v. *Monjar*, 47 F. Supp. 421 (D. Del.), affirmed, 147 F. 2d 916 (C.A. 3), certiorari denied, 325 U.S. 859, receipts for personal loans made to the principal defendant by members of a fraternal organization allegedly devoted to the propagation of ethics were held to be "evidences of indebtedness" and "investment contracts" within the coverage of the anti-fraud provisions of Section 17(a). A somewhat similar scheme was involved in *United States* v. *Carruthers*, 152 F. 2d 512 (C.A. 7), certiorari denied, 327 U.S. 787, where personal loans obtained from members of a pseudo-religious organi-

[6] Petitioners do not deny that the documents are "notes" (Pet. 18, 24). The court below characterized them as "evidences of indebtedness". 206 F. 2d, at 854 (R. 1335). Arguably, they also are "investment contracts" within this Court's rationale in *S.E.C.* v. *W. J. Howey Co.*, 328 U.S. 293, 298. In any event, they are not simple "I.O.U.'s" or chits, and petitioners' attempted *reductio ad absurdum* (Pet. 19) is an idle exercise in semantics. This is not to imply that a scheme to defraud by use of I.O.U.'s or chits could not contravene the anti-fraud provisions of the Securities Act.

zation by the defendant organizer were held to involve sales of securities subject to Section 17(a). In *S.E.C.* v. *Universal Service Ass'n*, 106 F. 2d 232 (C.A. 7), certiorari denied, 308 U.S. 622, sales of membership applications in a pseudo-religious and economic association, in which members were to receive benefits from certain agricultural activities in proportion to their contributions, were also held to fall within the purview of Section 17(a).[7]

Five of the six decisions relied upon by petitioners (Pet. 16-17) to support their contention that short-term notes are not securities involved constructions of certain provisions of the federal revenue laws, which do not define the term "security" and which present statutory considerations wholly irrelevant here. Moreover, while some of petitioners' notes purported to be short-term obligations, it appears that petitioners contemplated making the majority payable upon "mutual agreement" (GX 65)—prima facie not short term, but illusory obligations of a deceptive character.[8] Under Section 17(a), of course, it is immaterial whether the securities are short- or long-term. The registration provisions of the statute are inapplicable to certain short-term obligations. See Section 3(a)(3), 15

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[7] See, also, *S.E.C.* v. *Crude Oil Corp. of America*, 93 F. 2d 844 (C.A. 7), where a so-called "Bill of Sale and Delivery Contract" was held to be a security within the statutory definition; *S.E.C.* v. *Wickham*, 12 F. Supp. 245, 248 (D. Minn.), to the effect that the pooling of funds to bet on horse races, in return for certificates promising participations in the winnings, would involve the sale of "investment contracts".

[8] The evidence indicates that it was also planned to switch various persons who already held 60- or 90-day obligations to "mutual agreement" notes (R. 1126).

U.S.C. 77c(a)(3). As previously indicated, however, there is no such exemption from the anti-fraud provisions of Section 17(a).[9]

2. Petitioners' additional contention that they have not engaged in the "sale" of securities is equally without substance. The Court of Appeals (R. 1335-1336) properly pointed to the broad definition of "sale" in Section 2(3) of the Act (p. 3, *supra*) which includes any disposition of a security for value regardless of the particular form of the transaction. See *Bogy* v. *United States,* 96 F. 2d 734, 736 (C.A. 6), certiorari denied, 305 U.S. 608. In the *Monjar* case, (*supra,* p. 11) the court had no difficulty in concluding that the personal loans there obtained involved sales of securities within the meaning of the Act. To the same effect see *United States* v. *Carruthers* (*supra,* p. 11). Petitioners' attempt to characterize the transactions involved as mere disconnected individual loans unrelated to any purported venture or enterprise for which public funds were sought is amply refuted by the evidence summarized above.

3. Petitioners' contention that the trial court sitting without a jury erred in admitting into evidence certain exhibits, including three sets of original and

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[9] In the remaining case cited by petitioners, *Cecil B. DeMille Prod'ns* v. *Woolery,* 61 F. 2d 45 (C.A. 9), the court held that short-term notes purporting to assign certain overriding oil and gas royalty interests were void because no state permit had been obtained for such assignments. The court recognized that promissory notes were clearly securities under the California Corporate Securities Act, but observed that under that statute an ordinary note not offered to the public or to an underwriter for resale was not "such a security as to require a permit."

duplicate notes signed by petitioner Llanos (GX 61-63) is also without merit.

The notes had been prepared for use in petitioners' fraudulent scheme. There was ample evidence that petitioners had solicited the obligees named therein. Thus, the obligees on these notes included seven of the investor witnesses who testified at the trial (R. 1126), and the notes largely corresponded with the list of obligations filed by petitioners with the Territorial Treasurer (GX 52, 53). The notes were obtained by a witness who had observed their preparation by the petitioners (R. 149-153); and their preparation was referred to in a letter sent by one of the petitioners (R. 1126). The exhibits were admitted to show the scope and extent of the scheme to defraud, as to which great latitude is allowed in the introduction of evidence. *Suetter* v. *United States,* 140 F. 2d 103, 107 (C.A. 9). Clearly, therefore, their admission involved no error on the part of the trial judge.

CONCLUSION

The judgment below is correct and presents no question warranting further review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

WILLIAM H. TIMBERS,
General Counsel,
ALEXANDER COHEN,
Special Counsel,
HENRY L. STERN,
Attorney,
Securities and Exchange Commission.

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